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UNITED STATES DISTRICT COURT – NORTHERN DISTRICT OF CALIFORNIA

ANN OTSUKA, an individual; JANIS KEEFE,)	Case No.: C-07-02780-SI
an individual; CORINNE PHIPPS, an)	
individual; and RENEE DAVIS, an individual;)	NOTICE OF MOTION AND MOTION
individually and on behalf of all others similarly)	FOR DISMISS AND REMAND (Notice of
situated,)	Motion & Motion And Memorandum of
)	Points & Authorities)
Plaintiffs,)	
vs.)	
)	
POLO RALPH LAUREN CORPORATION; a)	
Delaware Corporation; POLO RETAIL, LLC., a)	
Delaware Corporation; POLO RALPH)	
LAUREN CORPORATION, a Delaware)	
Corporation, doing business in California as)	
POLO RETAIL CORP; and FASHIONS)	
OUTLET OF AMERICA, INC., a Delaware)	
Corporation,)	
)	
Defendants.)	

) Judge: Hon. Susan Illston
) Place: Courtroom 10, 19 th Floor
AND RELATED CROSS-CLAIMS) Date: May 2, 2008
) Time: 9:00 a.m.
)

NOTICE OF MOTION & MOTION TO DISMISS AND REMAND

PLEASE TAKE NOTICE that, on May 2, 2008, at 9:00 a.m., or as soon thereafter as the
 matter may be heard in Courtroom 10 (450 Golden Gate Avenue, San Francisco, California),

1 Plaintiff Justin Kiser will and hereby does seek an order dismissing Defendants' cross claims
2 against him and remanding the cross claims to the Superior Court of California for the City and
3 County of San Francisco.

4 This motion is brought pursuant to 28 U.S.C. § 1447, on the grounds that: (1) the Court
5 now lacks subject matter jurisdiction over the permissive cross claims; and/or (2) the Court should
6 use its discretion to dismiss the claims because they are unrelated to any issue or any person
7 involved in this employment class action case.

8 Plaintiff Justin Kiser sought and obtained dismissal of his claims in this complex
9 employment class action case on March 21, 2008, and no longer serves as a named plaintiff. And,
10 because the case is not yet certified, he is no longer before the Court in any capacity, except with
11 respect to Defendants' unrelated, permissive cross claims.

12 Defendants will suffer no prejudice upon dismissal and remand. On March 25, 2008,
13 Justin Kiser filed a complaint against Defendants in San Francisco Superior Court alleging claims
14 he previously asserted as a putative class representative in this matter. Thus, upon remand to the
15 California Superior Court, Defendants can seek to have their cross claims heard there.

16 This motion is based on this notice, the Memorandum of Points and Authorities that
17 follows, all pleadings and records on file, and such further argument and evidence as the Court
18 may permit.

19 Dated: March 28, 2008

THE LAW OFFICE OF PATRICK R. KITCHIN

20
21 /s/ Patrick R. Kitchin

22 By: Patrick R. Kitchin

23 Attorneys for Plaintiffs Janis Keefe, Corinne Phipps
24 and Renee Davis, and Cross-Defendant Justin Kiser
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction And Request For Relief

Pursuant to 28 U.S.C. § 1447, Cross-Defendant Justin Kiser asks the Court to dismiss Defendants' cross claims against him and order those claims remanded to San Francisco Superior Court. Defendants' cross claims do not relate in any way to the matters at issue in this state-wide employment class action case, or to any person in the putative class, and it should be adjudicated in state court where they were initially filed.

II. Defendants' Cross Claims Are Unrelated To Any Matter At Issue In This Class Action

Defendants filed their cross claims against Justin Kiser after Mr. Kiser filed this employment class action against them in the San Francisco Superior Court. The cross claims do not relate to any matter at issue in the class action, but only to issues relating to Justin Kiser as an individual. Specifically, Defendants claim Mr. Kiser misused his employee discount on a few occasions and thereby breached his duty of loyalty to the company. They also claim Mr. Kiser knew or should have known that merchandise credits used by a former Polo sales person with his assistance had been misappropriated.

Thus, the only relation these claims once had to this class action was to Justin Kiser as a named plaintiff. Now that Mr. Kiser has been voluntarily dismissed as a class representative, Defendants' cross claims have no relation whatsoever to the claims at issue in this uncertified case. Furthermore, Justin Kiser is now seeking relief against Defendants as an individual in an independent, single-plaintiff action in the San Francisco Superior Court. In that action, filed March 25, 2008, in San Francisco Superior Court, he alleges the claims he had alleged as a putative class representative in this case. (Justin Kiser v. Polo Ralph Lauren Corporation, et al., Case No.CGC-08-47348.)

Consequently, not only do Defendants' cross claims have no relation to the claims asserted in this case, Justin Kiser no longer has any relation to the claims asserted here either.

1 **III. The Independent Subject Matter Jurisdictional Basis For Defendants' Cross**
 2 **Claims No Longer Exists.**

3 Federal Rule of Civil Procedure 13(b) permitted Defendants to seek resolution of their
 4 employee discount claims against Mr. Kiser in this action. It was on that basis that jurisdiction
 5 over the claims existed. Rule 13(b) provides: "A pleading may state as a counterclaim against an
 6 opposing party any claim that is not compulsory." A permissive counterclaim, however, must
 7 have an independent basis for the assertion of subject matter jurisdiction. Iglesias v. Mutual Life
 8 Ins. Co. of New York, 156 F.3d 237, 241 (1st Cir. 1998). As of March 25, 2008, this basis for
 9 subject matter jurisdiction no longer exists. Justin Kiser is no longer an opposing party for any
 10 purpose other than to defend himself against Defendants' cross-claims. Thus, Defendants' cross
 11 claims should be dismissed and remanded to State court.

12 In addition, and/or in the alternative, under 28 U.S.C § 1367(c)(3), the Court has broad
 13 discretion to decline supplemental jurisdiction if: "the district court has dismissed all claims over
 14 which it has original jurisdiction." Here, Defendants removed this class action case from the San
 15 Francisco Superior Court under the Class Action Fairness Act (28 U.S.C. § 1332(d)) and under
 16 general diversity jurisdiction (28 U.S.C. § 1432(a)). Removal to this Court was solely based on
 17 the claims asserted by the class members. Defendants' cross claims against Mr. Kiser rode along
 18 on that removal as a permissively joined claim strategically designed to complicate the class
 19 proceedings. Following Mr. Kiser's dismissal of his claims, however, there no longer remains any
 20 basis for this Court's jurisdiction over the cross claims. The Court should use its discretionary
 21 authority to order the cross claims dismissed and remanded.

22 **IV. Dismissal And Remand Are Appropriate Under These Circumstances.**

23 Mr. Kiser's motion for dismissal and remand is timely and appropriate. The Court has
 24 broad discretion to grant this relief. Doing so will permit the parties to focus on the matters at
 25 issue in this class action and will avoid the waste of the resources of this Court and the named
 26 plaintiffs. Plaintiffs Janis Keefe, Ann Otsuka, Corinne Phipps and Renee Davis have nothing to do
 27 with these extraneous claims, nor do these claims relate in any way to the several thousand
 28 putative class members. These class members should not be required to address issues within this

1 class action case that do not concern any one of them. On March 25, 2008, when the Court
2 ordered Mr. Kiser dismissed from the case, the justification for maintaining jurisdiction over these
3 claims disappeared.

4 In relevant part, 28 U.S.C. § 1447(c) provides:

5 A motion to remand a case on the basis of any defect other than lack
6 of subject matter jurisdiction must be made within 30 days after the
7 filing of the notice of removal under section 1666(a). If at any time
8 before the final judgment it appears that the district court lacks
9 subject matter jurisdiction, the case shall be remanded. An order
10 remanding the case may require payment of just costs and any actual
11 expenses, including attorney fees, incurred as a result of the removal.

12 If the district court at any time determines it lacks jurisdiction over the removed action, *viz.*,
13 the cross claims, it must remand them to state court. 28 U.S.C. § 1447; *see, e.g. ARCO Envtl.*
14 *Remediation, LLC v. Dep't of Health and Envtl. Quality*, 213 F.3d 1108, 1113 (9th Cir. 2000).
15 "The district court, in a challenged case, may retain jurisdiction only where its authority to do so is
16 clear." *Gorman v. Abbott Laboratories*, 629 F.Supp. 1196, 1203 (D.R.I.1986). If the Court
17 determines Justin Kiser's dismissal of his claims destroyed the independent basis for jurisdiction,
18 then the claims must be dismissed.

19 If the Court determines it retains subject matter jurisdiction over the claims, the Court
20 should use its discretion to dismiss and remand the unrelated cross claims back to State court. In
21 *Alexander v. B.D. Walker*, C02-578 SI, (N.D.Cal. 6/9/2003), this Court held that the dismissal of
22 Federal claims in an action whose jurisdiction was premised on a Federal question, justified
23 dismissal and remand to state court. This Court declined to "exercise supplemental jurisdiction
24 over the state law claims" once the Federal question issue had been dismissed. This Court reached
25 the same conclusion in *East Bay Drivers Association v. Kaur*, C03-1241 SI (N.D.Cal. 6/9/2003).
26 In the instant case, jurisdiction over Defendants' cross claims was predicated on the presence of
27 Justin Kiser in this case as a named plaintiff. That predicate no longer exists. Thus, the cross
28 claims must be dismissed and remanded to State court.

Furthermore, it is well-settled under the case law that the burden is on the party seeking to preserve the district court's removal jurisdiction, not the party moving for remand to state court, to show that the requirements for removal have been met. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988). "The court may remand sua sponte or on motion of a party, and the parties who invoked the federal court's removal jurisdiction have the burden of establishing federal jurisdiction." (Tortola Restaurants, L.P. v. Kimberly-Clark Corp., 987 F. Supp. 1186 (N.D.Cal. 8/29/1997.)) This same standard should be applied in the Court's evaluation of Defendants' opposition to dismissal and remand under these circumstances.

V. Conclusion

Justin Kiser respectfully requests that Defendants' unrelated cross claims be dismissed and ordered remanded to the San Francisco Superior Court. The independent basis for subject matter jurisdiction over Defendants' permissive cross claims no longer exists and the claims belong in California state court.

DATED: March 28, 2008

THE LAW OFFICE OF PATRICK R. KITCHIN

By: /S/ Patrick R. Kitchin

Patrick R. Kitchin, Esq.

Attorneys for Plaintiffs Janis Keefe, Corinne Phipps and
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